BANK BUMIPUTRA MALAYSIA BERHAD v. YAP KIOW MOI & ORS.

[O.C.J. (Pawan Ahmad J.) January 16, 1973]

[Malacca — Civil Suit No. 17 of 1971]

Executors and Administrators — Executors carrying on testator's business — Contract entered into after the death of the testator — Executors personally liable.

In this case the executors of the estate of a deceased person carried on the business of the testator and for this purpose entered into a contract for overdraft facilities with the plaintiffs for the purpose of carrying on the business. The plaintiffs brought an action against the estate of the deceased claiming repayment of the overdraft and interest.

Held: the defendants were personally liable upon the contract that they entered into after the death of the deceased and the plaintiffs had no remedy against the estate of the deceased.

Cases referred to:-

(1) *Farhall* v. *Farhall* (1871) 7 Ch. App. 123.

(2) *Labouchere & others* v. *Tupper & others* [1843-60] All E.R. Rep. 937.

(3) *In re Evans* (1886-7) 34 Ch. D. 597.

(4) *Dowse & Ors.* v. *Gorton* [1891] A.C. 190.

CIVIL SUIT.

H. B. Ball for the plaintiffs.

G. Vadiveloo for the defendants.

Pawan Ahmad J.: In this action the plaintiffs' claim of $71,062.93, interest and costs against the three defendants is in their capacity as executors and trustees of the estate of Goh Joon Hoe, deceased. In other words, the action is against the estate of the deceased, Goh Joon Hoe. According to the amended statement of claim, the plaintiffs are bankers carrying on business at No. 8D-E, Jalan Hang Tuah, Malacca, while the defendants are the executors and trustees of Goh Joon Hoe, deceased, the sole proprietor of Malacca Precast Concrete Works, which carried on business at No. 297, Jalan Gajah Berang, Malacca.

The deceased Goh Joon Hoe died testate on 24th September, 1964 and the three defendants, together with one Goh Ann Kwang, were appointed receivers and managers of the deceased's estate and of his business by order of court dated 23rd December, 1964. By further order of court dated 29th June, 1965 Goh Ann Kwang was discharged as receiver and manager of the estate.

On 27th May, 1966 the three defendants as receivers and managers of the estate applied for overdraft facilities from the plaintiffs for the use and benefit of the deceased's business of Malacca Precast Concrete Works.

Grant of probate was issued to the three defendants on 28th February, 1968 as executors and trustees of the estate. Goh Ann Kwang, who is the 4th executor and trustee named in the will, renounced his rights and title to the probate and execution of the will. The plaintiffs further alleged that as on 28th February, 1971 the three defendants as executors and trustees of the estate of Goh Joon Hoe, deceased, were indebted to the plaintiffs in the sum of $71,062.93 as the amount due on the overdraft account granted to the defendants for the use and benefit of Malacca Precast Concrete Works together with interest and costs.

In their defence, the defendants averred that at no time was any overdraft facilities extended to them. They also contend that the plaintiffs have no cause of action against them and that the action is bad in law. As such they maintain that they are not liable to the plaintiffs.

At the outset of the hearing, the parties agreed that the action is against the estate of the deceased. According to PW1, who was then the Branch Manager of Bank Bumiputra, Malacca, all the three defendants opened a current account in his bank in May, 1966. At the time of the opening of the account they produced to PW1 the will of Goh Joon Hoe, deceased, a court order and a business registration certificate pertaining to Malacca Precast Concrete Works. PW1 obtained the signatures of the three defendants on a printed card on which was also affixed a rubber stamp bearing the words "MALACCA PRECAST CONCRETE WORK ... RECEIVERS AND MANAGERS." This is the standard registration card which has to be filled in by a client at the time of the opening of an account in the bank. According to PW1, the business registration form produced to him was numbered 58660, a copy of which is included as page 1 in the plaintiffs' bundle of documents marked 'A'. It was agreed between PW1 and the defendants that interest on the overdraft would be at the rate of 10.8% per annum and PW1 agreed to give the defendants overdraft facilities up to $50,000. This agreement between them was verbal, but the defendants did deposit some title deeds with PW1 as security. Although it was the intention of PW1 that a charge should be prepared in relation to the title deeds deposited with him, for some reason or other this was not done. He deposed that as on the date of the issue of the writ, a sum of $71,062.93 and interest was owing to the bank by the defendants in their capacity as executors and trustees of the estate of Goh Joon Hoe, deceased. On the basis of this, he prays for the judgment debt to be paid out of the estate.

Under cross-examination PW1 deposed that he was not aware of any business registered under the name of "Malacca Precast Concrete Works (1965)" and he also stated that there was in his bank another account under the name of the estate of Goh Joon Hoe, deceased.

Now, coming to the registration card filled in by the three defendants, (see page 15 of plaintiffs' bundle of documents Exhibit "A") it will be seen that the customer's name is given as "Malacca Precast Concrete Works" and nowhere in the card is any mention made as to the estate of Goh Joon Hoe, deceased. The nature of the account is shown as a "partnership" and the names of the three defendants are inserted therein as "Partners/Office-bears/Directors etc."

The second defendant, Wong Tee Lian, gave evidence for the defence. Here it might be stated that the first and third defendants have since been adjudged bankrupt. Wong Tee Lian (DW1) deposed that at the date of the death of the deceased, there were a few uncompleted contracts. On 23rd December, 1964 he obtained an order of the High Court for the appointment of receivers and managers with authority to carry out the uncompleted contracts. Under that or-

der the three defendants and one other, namely, Goh Ann Kwang, were appointed receivers and managers. However, as already stated in paragraph 2 above, Goh Ann Kwang was discharged by a further order of court made on 29th June, 1965. DW1 went on to state that the uncompleted contracts were completed about four or five months after the deceased's death. He also stated that the PWD refused to register him as an executor of the will of the deceased for the purpose of tendering for new contracts. The reason being that the firm was a sole proprietorship and that the three defendants were merely receivers and managers. Subsequently, upon legal advice, the three defendants registered themselves as a new firm known as "Malacca Precast Concrete Works (1965)" with all of them as partners. Since that date they tendered in the new name. He also deposed that he knew of some title deeds deposited with the bank, but he himself refused to mortgage the land to the bank. Lastly, he stated that he withdrew from the partnership on 24th December, 1967. In support of his evidence he produced Exhibit D2, which is a certified copy of an entry in the Register of Businesses in respect of the firm "Malacca Precast Concrete Works (1965)". He denied that the estate was liable to the bank.

The facts of the case which are material to this action are not in dispute. The Will of the testator authorises the executors to "carry on the said businesses without being responsible for the loss." (See paragraph 6 of the Will.) I am satisfied that the defendants entered into the contract with the plaintiffs *after* the death of the testator for the purpose of carrying on the business of Malacca Precast Concrete Works which business was carried on by the deceased during his life-time. I will now deal with the legal aspects of the matter.

In *Farhall* v. *Farhall*[1] the executrix of a testator kept an executorship account with a bank, and having a power, under the will, to mortgage the real estate, she deposited with the bank title deeds of part of the estate as security. The account was overdrawn and the moneys to a great extent misapplied. As the security was insufficient to pay the balance, the bank made application to prove as creditors against the estate for the difference. On appeal the court ruled that the bank was not entitled to prove this debt in competition with the other creditors of the estate. Sir W. M. James L.J. at page 125 said:

"In this case it seems to me quite clear that there was no legal debt due from the estate to the bank. The executrix borrows money as executrix, says that she is executrix, and the bank debit her as executrix. To say that this charges the estate would give executors power to create debts to an unlimited extent. The executor has the power to realize the personal estate and to pledge specific assets, which is one mode of realizing them.... But to say that the executrix can, by borrowing money, enable the person who has lent it to stand as a creditor upon the estate, is a position supported by no authority and no principle. The contract is with the executrix; there is no loan to the estate; there is no credit given to the estate; the credit is given only to the person who borrows, though the money may be borrowed for the purposes of the estate."

In the same case Sir G. Mellish L.J. said:

"I am of the same opinion. It appears to me to be settled law that, upon a contract of borrowing made by an executor after the death of the testator, the executor is only liable personally, and cannot be sued as executor so as to get execution against the assets of the testator...."

Further at page 128 he goes on to say:

"That case shews plainly that no contract can be made with an executor which will not charge him personally, but will charge him *de bonis testatoris*. There were counts for goods sold and delivered, and work and labour done.... yet it was held that on those counts the defendant could only be charged personally, which shews how strict the law is.

...the debts contracted by the executor cannot come into competition with the debts contracted by the testator in respect of their being paid out of the assets."

In *Labouchere & Others* v. *Tupper & Others*[2] Knight-Bruce L.J. at page 940 said:

"The executor of a trader carrying on the trade after his death, though doing so avowedly in the character of the executor, is nevertheless personally liable for all the debts contracted in the trade after the trader's death, whether he is entitled or not entitled to be wholly or to any extent indemnified by the testator's personal estate, and whether it is sufficient or insufficient for the purpose; nor does the propriety of his conduct as between himself and those beneficially interested in the testator's personal estate, give the creditors of the trade becoming so after the trader's death the rights of creditors of the testator, it being immaterial, also, so far as they are concerned, whether the testator, if he had a partner, was bound by a covenant with him that the testator's executors should continue the trade in partnership with the surviving partner."

In *In re Evans*[3] the administratrix of an intestate, a dealer in builders' materials, carried on the intestate's trade, and bought cement for the purposes of the trade. The vendors recovered judgment against the administratrix for the price of the cement. The cement was sold with other effects by order in an administration action. The vendors did not issue execution, but applied in the administration action to have the proceeds of sale applied in payment of their debt. Kay J., refused this relief, but declared them entitled to a lien on the beneficial interest of the administratrix in the estate. The vendors' appeal from that order was dismissed. Cotton L.J. at page 601 said:

"The creditor cannot have any direct claim against the intestate's estate. He cannot have anything higher than a right to be substituted to the right of the administratrix to indemnity. Where a business is carried on by a trustee with proper authority, and he buys for the business goods for the price of which he is personally liable, the *cestuis que trust* cannot say to the trustee: 'These goods belong to us and we will take them without regard to your right to indemnity.'.... The appellants therefore have no claim to be paid as they ask out of the proceeds of these goods."

In *Dowse and Others* v. *Gorton*[4] the testator's business was carried on by the executor for about three years after his death in accordance with the provisions of the will in the interest of the creditors and the beneficiaries and was properly carried on. It was held that the executors were entitled (in priority to claims by the creditors) to be indemnified out of the testator's estate against the liabilities which they had properly incurred.

The court's reference was invited by counsel for the plaintiffs to *Atkin's* Court Forms, 1st Edition, Volume 12, Form 123. The Indorsement reads as follows:

"The plaintiffs claim is for the balance of the price of goods sold and delivered to the defendants for the business of... formerly carried on by X.Y., deceased but now carried on by the defendant as executor (administrator) of the said X.Y.."

and to section 71(1) of the Probate and Administration Ordinance, 1959, the relevant parts of which read as follows:

"Subject to the provisions of section 60 every contract entered into by a personal representative in exercise of his powers of administering an estate shall be binding on and enforceable against and by the personal representative for the time being of the deceased, . . ."

Mr. Vadiveloo for the defendants submitted that the estate was not liable because the bank was not a creditor of the testator. He submitted that a distinction should be drawn between the old creditors, *i.e.* the creditors before the death of the deceased, and the new creditors, *i.e.* creditors after the death of the deceased. He submitted that as to the old creditors, the estate was liable, but in the case of new debts the estate cannot be liable. He further submitted that the ventures entered into by the executors and trustees were private ventures and the estate cannot be bound by what they did, as the credit was given to them in their capacity as personal representatives, but not to the testator.

Mr. Ball for the plaintiffs submitted that the executors were bound to carry out the terms of the Will and as such the business was lawfully carried out after the death of the testator.

I do not think that the forms referred to on page 9 or section 71(1) of the Probate and Administration Ordinance, 1959 are of any assistance in the case before the court. All that these indicate is that an action lies against a personal representative, but nowhere does there appear to be any right given to a creditor to prove debts against the estate in a contract entered into after the death of the deceased by the personal representatives.

The following passage from *Chitty* on Contracts (23rd Edition), Volume 1, page 503, paragraph 1080, summarises the position as to the liability of an executor carrying on business of the testator:

"Unless empowered to do so by the testator's will, an executor is not entitled to carry on the testator's business, except for the purpose of winding it up. *If he does carry it on, whether with or without authority, he is personally liable upon the contracts he makes, and persons contracting with him have no remedy against the testator's assets.* The executor, if he has carried on the business in accordance with his duty, has a right to be indemnified out of the estate and any profits made belong to the estate. He is not, however, entitled to be indemnified out of the estate, in priority to the testator's creditors, even when empowered by the will to carry on the business, unless they consent to its being carried on. The fact that the creditors stand by with knowledge that it is being carried on without interference is not of itself sufficient to show consent. Executors who carried on their testator's business under the powers of his will in the same firm name as before were held not to be partners, though no doubt joint debtors."

I rule that the three defendants as executors and trustees are personally liable upon the contract that they entered into with the plaintiffs after the death of the deceased and that the plaintiffs have no remedy against the estate of the deceased. The action is therefore dismissed with costs.

Action dismissed.

Solicitors: *Bashir & Co.; G. Vadiveloo.*

TIONG CHI SENG & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (Tan Chiaw Thong J.) May 8, 1973]

[Sibu — Criminal Appeal No. 5 of 1972]

Criminal Law and Procedure — Sentence — Charge of assisting in carrying on a public lottery — Documentary evidence — Failure to explain significance of such evidence — Principles on which appealate court will interfere with sentence.

The appellants had been convicted of the offence of assisting in carrying on a public lottery and sentenced to one week's imprisonment and a fine of $1,600.00. They appealed against their sentence.

Held: as the full significance of the documentary exhibits in this case had not been shown, and in the circumstances of this case and in view of the fact that the appellants were first offenders, the sentence of imprisonment imposed on them should be quashed.

Cases referred to:-

(1) *Yap Teng Chai* v. *Public Prosecutor* [1959] M.L.J. 205.

(2) *Abdul Karim* v. *Reg.* [1954] M.L.J. 86.

(3) *R.* v. *Ball* (1951) 35 Cr. App. R. 164.

(4) *Abu Bakar bin Alif* v. *R.* [1953] M.L.J. 19 at p. 20.

(5) *Kang Yeow Hooi and others* v. *Public Prosecutor* [1954] M.L.J. 233.

(6) *Wong Liang Nguk* v. *Public Prosecutor* [1953] M.L.J. 247.

(7) *R.* v. *Cargill* (1913) 8 Cr. App. R. 224.

CRIMINAL APPEAL.

C. T. Wong for the appellants.

Anthony Tai (Deputy Public Prosecutor) for the defendant.

Tan Chiaw Thong J.: In this case the two appellants together with three other accused pleaded guilty to a charge of assisting in carrying on a public lottery. In outlining the facts relating to the charge, the prosecution tendered certain documentary exhibits. Although it was alleged by the prosecution that all the exhibits were concerned with the offence specified in the charge, it seems clear that at least two of them, namely, three cheques (Ex. P13) and an agreement (Ex. P9) relating to the formation of a syndicate for the collection of funds and investment thereof were not shown to have any connection with the charge. No attempt was made to explain the other exhibits in relation to the charge and although it was stated by the prosecution as to what they were, no evidence was placed before the court as to their full significance particularly with regard to the magnitude of the illegal four digits lottery that was alleged to have taken place. The court was not therefore in a position to appreciate the full gravity of the offence charged. In a case of this sort where the documents do not speak or do not fully speak for themselves, it is incumbent on the prosecution to explain the significance of each and every exhibit tendered so as to enable the court to appreciate their full significance in relation to the charge before it.

The two appellants who were the first and fifth accused in the case originally appealed against both conviction and sentence. At the outset of the hearing, counsel for both appellants indicated that the appellants were abandoning their appeal against conviction and the appeal thus proceeded as one against sentence